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No. 94-2065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LYLE R. GOETZ, MARK CANS and
ANNA SELLETTI, on behalf of themselves
and all others similarly situated,

Petitioners,

-against-

The Honorable MATTHEW CROSSON,
in his official capacity of chief
administrator of the courts of New York,
and DR. RICHARD C. SURLES, in his
official capacity of Commissioner
of the New York State Office
of Mental Health,

Respondents.

MOTION TO FILE AN *AMICUS CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND DISABILITY ADVOCATES, INC., IN SUPPORT OF PETITION FOR *CERTIORARI*

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MOTION TO FILE AN *AMICUS CURAIE* BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*

1. I am an attorney admitted to practice before this Court and in this proceeding represent the National Association of Protection and Advocacy Systems and Disability Advocates, Inc. Pursuant to Rule 37 of the Supreme Court, the undersigned moves to proceed for leave to file a brief in support of the petition for *certiorari* in the above matter.

2. Consent to file this brief has been obtained from both the petitioners and the respondents.

3. The petition for *certiorari* raises the issue of whether the State must provide an indigent individual facing civil commitment with a psychiatric expert who can testify on the patient's behalf if the patient's clinical conditions warrants such testimony and assist in the preparation and presentation of the patient's case. This brief will bring to the attention of this Court a number of issues that are important when determining whether or not this Court should grant *certiorari*.

4. For example, the *amicus* brief sets forth the statutory provisions for the provision of expert assistance in other jurisdictions and hence, details how one of the issues raised impacts upon not only the class petitioners represent but thousands of mentally ill individuals nationally. who are subject to the civil commitment process.

5. This brief also details the necessity of psychiatric assistance because of the fallibility of both psychiatric diagnoses and the prediction of dangerousness which frequently go unchallenged and which courts frequently accept without reservation.

WHEREFORE, I respectfully request that this Court grant leave to file this brief in support of the petition for *certiorari*.

Dated: Islandia, New York
August 18, 1995

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BRIEF OF THE NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS AND DISABILITY ADVOCATES, INC., IN SUPPORT OF PETITION FOR *CERTIORARI*

INTEREST OF *AMICI CURIAE*

The National Association of Protection and Advocacy Systems ("NAPAS"), founded in 1981, is a membership organization for the nationwide system of

protection and advocacy agencies ("P&As"). P&As are established under the Protection and Advocacy for Mentally Ill Individuals ("PAMII") Act, as amended, 42 U.S.C. § 10801 *et seq.*, and related federal statutes, to provide legal representation and advocacy on behalf of persons with disabilities. In fiscal year 1994 alone, P&As served well over 600,000 individuals. NAPAS provides P&As with training and technical assistance and represents their interests before all branches of the federal government.

Disability Advocates, Inc., is a disability rights organization that performs protection and advocacy services pursuant to the PAMII Act. Disability Advocates is the organization responsible for providing protection and advocacy services to mentally ill individuals in Dutchess County, New York State. Hence, Disability Advocates is responsible for protecting the legal rights of members of the plaintiff class in this lawsuit. Consent has been obtained by the *amici* to file this brief.

Amici believe that this case raises a critical issue regarding the civil commitment of mentally ill individuals. The erroneous civil commitment of a person labeled mentally ill can have dire consequences. First, involuntary hospitalization results in a severe curtailment of individual liberty and freedom. Second, wrongful confinement can result in other unintended consequences. Many psychiatric institutions provide substandard treatment and subject patients to abuse and neglect. Moreover, prolonged hospitalization can actually worsen the mental state of people who could just as effectively receive treatment for any disability on an out-patient basis.

Amici are concerned that the current procedures in New York, which parallel procedures in other states, do not adequately protect patients whom a state subjects to a civil commitment hearing. In every instance, the committing hospital not only proffers expert psychiatric testimony, but can also rely on its psychiatrist to aid in its opposition to the patient's case. Such procedures do not adequately protect against erroneous confinement and lead to the harmful consequences that befall involuntarily hospitalized patients.

This brief will address issues arising out of the Second Circuit opinion dated June 10, 1992. However, for the reasons given in the petition for *certiorari*, *amici* believe that both the holding of the Second Circuit opinion dated November 28, 1994, and the significance of the issues arising out of the court's opinion, also warrant the granting of *certiorari*.

REASONS FOR GRANTING THE WRIT

THE PETITIONERS RAISE ISSUES OF A FUNDAMENTAL IMPORTANCE THAT AFFECT INVOLUNTARILY HOSPITALIZED PATIENTS THROUGHOUT THE UNITED STATES.

The critical role played by a psychiatric expert in a commitment hearing is beyond dispute. As this Court has recognized, "[w]hether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and

psychologists." *Addington v. Texas,* 441 U.S. 418, 429 (1979) (emphasis in original). An examination of the record by *amici* reveals that in every commitment hearing in Dutchess County, the psychiatric hospital builds its case around expert testimony. *See* JA-393-94; 476.[1] Moreover, judges in Dutchess County, like every place else place an extraordinary amount of weight on the testimony of psychiatric experts. Accordingly, it is no surprise that the record further details that judges in Dutchess County almost always defer to expert testimony when deciding commitment cases. *See* JA-363, 479-480, 495.[2]

Thus, the granting of *certiorari* would enable this Court to determine whether the Constitution requires the provision of a court-appointed expert as of right, and, if so, in what capacity the court-appointed expert should function. The Second Circuit found that a court-appointed expert serves only to provide information to the court by requiring the appointment of a psychiatrist whose sole function consists of testifying about the patient's mental condition. However, in viewing the expert's role in such a limited fashion, the Second Circuit failed to apply this Court's view of a psychiatric expert as defined in *Ake v. Oklahoma,* 470 U.S. 68 (1985), as well as that

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[1]Unless otherwise noted, JA-_ refers to the joint appendix for the June 1992 opinion of the Court of Appeals.

[2]The record below is entirely consistent with the published literature that has universally found the extensive correlation between expert testimony and judicial dispositions when one's mental health is at issue. *See e.g.,* Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law,* 51 So. Cal. L. Rev. 527, 536 n.16 1978); Slobogin, *Dangerousness and Expertise,* 133 U. Pa. L. Rev. 97, 147 n.182 (1984).

of other circuits in proceedings in the context of the insanity defense. When a criminal defendant raises the insanity defense, a court must appoint an expert "who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. In this role,

> [P]sychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior. . .They know the probative questions to ask the opposing party's psychiatrists and how to interpret their answers. . . . [P]sychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand.

470 U.S. at 80. The Second Circuit referred to this type of expert as a consulting psychiatrist and an expert whose sole function is to provide testimony about a patient as an independent psychiatrist. *Goetz v. Crosson,* 967 F. 2d 29, 34-36 (2d Cir. 1992).

An independent psychiatrist who is responsible to the court rather than to the patient cannot perform the functions required by this Court in *Ake*. *See United States v. Sloan,* 776 F. 2d 926, 929 (10th Cir. 1985) ("essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared

with the prosecution"); *Smith v. McCormick,* 914 F. 2d 1153, 1157 (9th Cir. 1990) (right to psychiatric assistance involves opportunity to use psychiatrist in whatever role counsel deems appropriate). Accordingly, reliance on an expert whose function is to provide only testimony for either side places indigents at a severe disadvantage in the adversarial system because they lack the resources to participate in a "battle of the experts." Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases,* 41 Hastings L. J. 281, 348 (1990).

The issues raised by the petitioners are not limited to only New York State. Rather, a survey of the applicable laws reveals that most states do not provide psychiatric assistance to indigent civilly committed patients. Only three states provide as of right for a psychiatric expert who serves to assist the patient in his case.[3] Fifteen states provide as of right for an evaluation by an expert who is available only to testify at the hearing.[4] In the remaining states, discretion for the appointment of an expert who will serve only as a witness rests with the court or there are no provisions for any appointment of a expert upon

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[3]NEB. REV. STAT. § 83-1052 (1994); N.M. STAT. ANN. § 43-1-11 (1993); S.D. CODIFIED LAWS ANN. § 27A-11A-9 (1992).

[4]ALASKA STAT. § 47.30.745(e) (1994); ARIZ. REV. STAT. ANN. §§ 36-505, 36-538 (1993); DEL. CODE ANN. tit. 16, § 5006 (1983); FLA. STAT. ANN. § 394.467(3)(a) (1993); IOWA CODE ANN. § 229.10 (WEST 1994); KY. REV. STAT. ANN. § 202a.066 (Michie/Bobbs-Merrill 1991); MICH. COMP. LAWS ANN. § 330.1463 (West 1992); MINN. STAT. ANN. § 253B.07(3) (West 1994); MONT. ANN. STAT. § 53-21-118 (1993); MO. ANN. STAT. § 632.345 (Vernon 1988); N.D. CENT. CODE § ANN. § 5122.15 (4) (Anderson 1993); OHIO REV. CODE ANN. § 5122.15(4); R.I. GEN. LAWS § 40-1-5-8(6) (1990); VA. CODE ANN. §31.1-67.3 (1990 and Supp. 1995); VT. STAT. ANN. tit. 18 § 7613 (1987) : W. VA. CODE § 27-5-4 (g) (3) 1992).

the request of an indigent civil patient.[5]

In holding that due process does not require the provision of psychiatric assistance as of right, the Second Circuit reasoned that civil commitment hearings are not entirely adverse, *Goetz v. Crosson,* 967 F. 2d at 34-35, a premise that flies in the face of case law from this Court. If, as this Court has held, a paternity suit is "quasi-criminal" in nature because state involvement undeniably pervades the proceeding, *Little v. Streater,* 452 U.S. 1, 9 (1981), then a civil commitment hearing in which the subject faces a loss of liberty, is certainly "quasi-criminal" and hence, adversarial. As one authority has recognized,

> [T]he fundamental penalty paid by convicted criminals has its source not in the actual routine inside the prison, but in their loss of personal liberty, a loss endured by those committed to mental hospitals no less than by those imprisoned. Thus, even if one were to receive excellent care in a hospital, the erroneously committed person suffers no less a loss of liberty than the unjustly convicted

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[5]The following statutory provisions permit, but do not require, a court to appoint an independent expert: COLO. REV. STAT § 27-10-111(2) (1989 and Supp. 1994); GA. CODE ANN. § 37-3-81(4) (Harrison 1982); HAW. REV. STAT. § 334-60.5(h) (Harrison 1982); ILL. ANN. STAT. Ch 5/3-804 (Smith-Hurd 1993); LA. REV. STAT. § 28:54(2) (West 1994) MASS. GEN. LAWS ANN. Ch. 123, § 5 (West 1986 and Supp. 1995); S.C. CODE ANN. § 44-17-530 (Law Co-op 1985 and Supp. 1992); TEXAS HEALTH & SAFETY CODE ANN. § 574.010 (Vernon 1992). *Amici* have been unable to uncover statutory provisions in other jurisdictions, if any such provisions exist.

individual.

Note, "The Role of Counsel in the Civil Commitment Process: A Theoretical Framework" in D.B. Wexler, *Therapeutic Jurisprudence: The Law as a Therapeutic Agent* 309, 314 (1990). Moreover, like a criminal defendant, not only does a civil committee face a loss of liberty, but also the stigma that attaches to a finding of mental illness and dangerousness. *See Addington v. Texas,* 441 U.S. at 425.

Indeed, a civil committee often faces greater deprivations than does the criminal defendant. First, a civil patient is liable for the cost of hospitalization. *Goetz v. Crosson,* 967 F. 2d at 33. Moreover, the civil patient faces a far greater deprivation of liberty than does the criminal defendant who raises the insanity defense. A criminal defendant who successfully raises the insanity defense will still suffer a deprivation of liberty. The state will simply confine him in a psychiatric hospital instead of a jail.[6] On the other hand, a successful civil committee wins his outright release.

The quasi-criminal nature of commitment proceedings can also be evidenced by an examination of the function of the civil commitment process. The purposes of a civil commitment proceeding parallel those of criminal punishment. It is well-settled that the civil

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[6]If Mr. Ake successfully asserted the insanity defense he would have faced automatic commitment pursuant to OKLA. STAT. tit. 22 § 925 (1986). New York subjects insanity acquittees to automatic commitment pursuant to NEW YORK CRIMINAL PROCEDURE LAW § 330.20(3) (McKinney 1986).

commitment process is designed to facilitate the provision of treatment for mentally ill individuals deemed to require in-patient treatment and protect society and the patient from the potential dangerousness of such people. *See Jones v. United States,* 463 U.S. 354, 368 (1983). Likewise, criminal punishment serves to eliminate future criminal acts by, *inter alia*, confinement and rehabilitation. Torcia, I *Wharton's Criminal Law,* § 1 at 2-3 (14th ed. 1978). By accepting in the name of treatment less procedural protections that one may ordinarily expect, the Second Circuit continued countenance the use of unchallenged psychiatric testimony to dominate the commitment process. As detailed below, such an approach is ill advised.

DUE PROCESS REQUIRES THE APPOINTMENT OF A PSYCHIATRICT EXPERT SO THAT A COURT DOES NOT RELY SOLELY ON THE POTENTIALLY UNRELIABLE TESTIMONY OF ONE EXPERT.

This Court has recognized, when one's mental status and dangerousness is at issue, the provision of expert assistance "so dramatically enhance[s]" the potential accuracy of the factfinder's determination. *Ake v. Oklahoma,* 470 U.S. at 83. Providing a patient with a psychiatric expert who will help an attorney probe and dissect adverse psychiatric testimony will likely result in the attorney effectively challenging weaknesses in adverse expert testimony. *See Ake*, 470 U.S. at 82-83. This should result in courts scrutinizing more carefully, and ceasing to accept without reservation, individual psychiatric testimony. As a result, courts will no longer render

decisions that are tied so directly to the unchallenged conclusions of a psychiatric expert. JA-577.

Careful scrutiny of psychiatric testimony is necessary because individual psychiatric diagnoses may be unreliable. Underlying courts' routine acceptance of the conclusions of the psychiatric expert, *see supra* at 3, is the assumption that psychiatrists can accurately diagnose and predict future dangerousness. However, this Court has recognized that "[p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, or the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Ake v. Oklahoma,* 470 U.S. at 81. Indeed, it was just this lack of certainty regarding psychiatric diagnoses that led this Court to hold that due process requires the imposition of the clear and convincing standard of proof at commitment hearings because "there is serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Addington v. Texas,* 441 U.S. at 429.

Even under ideal conditions, psychiatrists have been found to agree on diagnoses on only thirty-two to forty percent of the time. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 Calif. L. Rev. 692, 704 (1974); *see also* Lipton & Simon, *Psychiatric Diagnosis in a State Hospital: Manhattan State Revisited,* 36 Hosp. & Comm. Psych. 368, 370, 372 (1985) (at one New York State facility, psychiatrists incorrectly diagnosed seventy-three out of eighty-nine patients as schizophrenic, a diagnosis

that can carry an incorrect prognosis for long-term hospitalization). Further, an examination of the record reveals that the conditions under which psychiatrists examine class members and testify at commitment hearings are as far from ideal as conditions could possibly be. The committing hospitals utilize the services of one doctor who does not treat the patients about whom he testifies. Rather, his job is to examine patients about whom a decision has been made previously to confine, in order to gather evidence which he could use at trial to substantiate the need for hospitalization. *See* JA-537-38.

The inability of psychiatrists to predict dangerousness is even more pronounced. The American Psychiatric Association has recognized that the unreliability of psychiatric predictions of dangerousness is an accepted fact within the profession and when predicting violence, dangerousness or suicide, psychiatrists are far more likely to be wrong than right. *Barefoot v. Estelle,* 463 U.S. 880, 920-21 (1983) (Blackman, J. dissenting). The psychiatric profession has recognized that,

> Neither psychiatrists nor anyone else have reliably demonstrated an ability to predict future violence or "dangerousness." Neither has any special psychiatric "expertise" in this area been established.

Clinical Aspects of the Violent Individual, American Psychiatric Association Task Force Report 28 (1974).

There are many reasons why psychiatrists often err when assessing an individual's dangerousness. For one, a psychiatrist will never learn about an incorrect prediction

of violence, but will always learn about an incorrect prediction of nonviolence. Ennis & Litwack, *supra* at 712, n.57. Thus, a psychiatrist will receive severe criticism if he incorrectly predicts nonviolence, but no consequences result from an incorrect prediction of dangerousness. Diamond, *The Psychiatric Prediction of Dangerousness,* 123 U. Pa. L. Rev. 439, 447 (1974). Finally, a psychiatrist's background does not train him to make such predictions. A typical mental health professional is concerned with diagnosing and treating mental illness, skills that are of limited utility in evaluating dangerousness. Slobogin, *supra* at 129.

Finally, the provision of a psychiatric expert as of right is needed to ensure that psychiatric hospitals do not eviscerate due process rights through uncontroverted psychiatric testimony. Although this Court has held that substantive due process prohibits the confinement of a nondangerous mentally ill individual, *see O'Connor v. Donaldson,* 422 U.S. 563, 576 (1975); *Jones v. United States,* 463 U.S. 354, 368 (1983), numerous commentators have recognized that incorrect psychiatric predictions of dangerousness are often a function of a desire to provide care and treatment to individuals deemed mentally ill. *See e.g.,* Mulvey & Lidz, *Back to Basics: A Critical Analysis of Dangerousness Research in a New Legal Environment,* 9 L. & Human Behav. 209, 214 (1985). Although a state must prove dangerousness, frequently, "the literal meaning of dangerousness is admittedly ignored in favor of the best interests of the patient, *i.e.,* whether he will benefit from treatment." Wexler & Scoville, *The Administration of Psychiatric Justice: Theory and Practice in Arizona,* 13 Ariz. L. Rev. 1, 100 (1971). Another authority has found that

> [I]f the ticket to involuntary treatment is a prediction of violence, many psychiatrists and psychologists are willing to punch it (Monahan & Cummings 1975), regardless of whether they actually believe the patient to be violence-prone. The organizational contingencies operating upon mental health professions to keep patients who are believed to "need" treatment, whether violent or not, may be intense.

Monahan, *The Clinical Prediction of Violent Behavior* 51, National Institute of Mental Health Monograph (1981).

It is well-settled that due process is measured by fundamental fairness. *See e.g., McKeiver v. Pennsylvania,* 403 U.S. 528, 543 (1971). Fundamental fairness demands that civil committees have access to their own expert to combat otherwise uncontroverted and highly influential expert testimony whose accuracy may be questionable.

THE NEED TO CLARIFY DUE PROCESS PRINCIPLES APPLICABLE TO CIVIL COMMITMENT PROCEEDINGS WARRANTS THE GRANTING OF *CERTIORARI.*

The unique nature of a civil commitment hearing warrants the granting of *certiorari* in order to set forth guidelines for lower courts to follow when applying due process principles to commitment hearings. On one hand, this Court has recognized the "massive curtailment of

liberty" that civil commitment entails. *Vitek v. Jones,* 445 U.S. 480, 491-92 (1980) quoting *Humphrey v. Cady,* 405 U.S. 504, 509 (1972). A number of lower courts have emphasized this deprivation of liberty to impose stringent procedural protections for civil committees. *See e.g., Doremus v. Farrell,* 407 F. Supp. 509 (D. Neb. 1975) (three-judge court); *Kendall v. True,* 391 F. Supp. 413 (W.D. Ky. 1975) (three-judge court); *Lynch v. Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974) (three-judge court).

On the other hand, this Court has stated that "[u]nlike a delinquency proceeding. . . a civil commitment can in no sense be equated to a criminal prosecution." *Addington v. Texas,* 441 U.S. at 428. As such, a number of lower courts, including the Court of Appeals in this proceeding, have emphasized the medical nature of the commitment hearing to justify with dispensing of procedural protections that might otherwise be required by the Fourteenth Amendment. *See e.g., Goetz v. Crosson,* 967 F. 2d at 34-35; *Project Release v. Prevost,* 722 F. 2d 960, 974-75 (2d Cir. 1983); *French v. Blackburn,* 428 F. Supp. 1351, 1355 (M.D.N.C. 1977) (three-judge court), *aff'd mem.,* 443 U.S. 901 (1979); *Logan v. Arafeh,* 346 F. Supp. 1265, 1269 (D. Conn. 1972), *aff'd mem. sub nom. Briggs v. Arafeh,* 411 U.S. 911 (1973).

These cases illustrate the *sui generis* nature of civil commitment hearings. On one hand, as in criminal and delinquency proceedings, a patient loses his liberty. On the other hand, states involuntarily hospitalize patients in order to provide a benefit to the patient in the form of necessary care and treatment. Under these circumstances, one would have expected a detailed body of case law from

this Court delineating the procedural protections required in a civil commitment hearing. Not only do no such cases exist, but, as the petitioners point out in their *certiorari* petition, there are no cases setting forth the appropriate framework for due process analysis.

One can contrast the absence of procedural due process cases for civilly committed adults[7] with case law for juveniles facing confinement in delinquency hearings and adults facing incarceration in sexual delinquency proceedings. *See e.g., In re Gault,* 387 U.S. 1 (1967) (provision of notice and counsel in, and applicability of privilege against self incrimination to, delinquency proceedings); *McKeiver v. Pennsylvania,* 403 U.S. 528 (1971) (no right to jury trial in delinquency hearings); *Specht v. Patterson,* 386 U.S. 605, 610-11 (1967) (right to notice, counsel and cross-examination of witnesses in sexual delinquency proceedings); *Allen v. Illinois,* 478 U.S. 364 (1986) (privilege against self-incrimination not applicable to sexual delinquency hearing).

The absence of definitive case law from this Court pertaining to the civil commitment process is particularly troubling in light of a number of pronouncements from this Court which have provided conflicting messages for the lower courts. To date, *Addington v. Texas* is the only case from this Court to address procedural due process issue. However, *Addington* involved the question of the standard of proof in a commitment hearing, which serves to allocate the risk of error in the proceeding. 441 U.S.

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[7] In *Parham v. J.R.*, 442 U.S. 584 (1979), this Court addressed the scope of procedural protections the state must provide when a parent commits a child under a state's minor voluntary commitment provisions.

at 423. Accordingly, it is understandable that this Court would address the harm resulting not only from an erroneous confinement but also a wrongful release. *See* 441 U.S. at 429 ("[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma"). The Second Circuit relied upon this language to hold that commitment proceedings are not entirely adverse. *See* 967 F. 2d at 34-35. However, this Court in *Addington* also held that "an erroneous commitment is sometimes as undesirable as an erroneous conviction. . .[and]. . .should be avoided in the first instance." 429 U.S. at 428. This was a relevant consideration in *Addington* because the erroneous failure to commit as a result of an unduly high standard of proof could harm the subject of the commitment hearing. No potential harm to a patient occurs when requiring the provision of expert assistance because the appointment of an expert can only enhance the accuracy of the proceeding.

Other case law from this Court strongly suggests that a court should consider civil commitment hearings to be completely adversarial and require stringent procedural protections. This Court has frequently recognized the severe nature of a loss of physical liberty. *See e.g., In re Gault,* 387 U.S. at 36 (proceeding where child will be found delinquent and subjected to loss of liberty comparable in seriousness to a felony prosecution); *Lassiter v. Department of Social Services,* 452 U.S. 18 (1981) (right to counsel presumptively attaches only when individual suffers a loss of liberty). Moreover, an individual found to be in need of involuntary hospitalization suffers the same consequences as a convicted criminal who has been jailed - the loss of liberty

and the imposition of stigma that results from society labeling such individuals either "criminal" or "mentally ill" and "dangerous." *See In re Winship,* 397 U.S. 358, 363 (1970); *Addington v. Texas,* 441 U.S. at 425-26.

The provision of treatment does not justify dispensing with procedural protections for the mentally ill. Like a civil committee, both the convicted criminal and the juvenile delinquent receive rehabilitative measures while confined. *See Addington v. Texas,* 441 U.S. at 425-26; *McKeiver v. Pennsylvania,* 403 U.S. at 552 (White, J. concurring); *Morrissey v. Brewer,* 408 U.S. 471, 484 (1972). Under these circumstances, only the finding of blameworthiness, implicit in a criminal conviction, *see McKeiver v. Pennsylvania,* 403 U.S. at 551-53 (White, J. concurring), is the distinguishing factor that appears to be the justification for the elimination of procedural protections for the mentally ill. This is a very slim reed upon which to reduce due process protections. Indeed, any decision to justify reduced procedural safeguards on the ground that the government is acting in the best interest of the individual must be "candidly appraised" and is particularly troubling in "light of the wide divergence of medical opinion regarding the diagnosis and proper therapy for mental abnormalities." *O'Connor v. Donaldson,* 422 U.S. at 586-87 (1975) (Burger, C.J. concurring).

Perhaps even more significantly, this justification for lessening procedural protections rests upon the assumption that every person subject to the commitment process suffers from some disability and will benefit from treatment whether or not he satisfies the civil commitment criteria. In other words, the justification for reduced

criteria. In other words, the justification for reduced procedural protections begs the issue at hand because it assumes that every person facing involuntary hospitalization will benefit from treatment. This case provides this Court with an opportunity to correct this leap of logic by developing a framework by which lower courts are to measure procedural protections that a state must provide to civilly committed individuals.

CONCLUSION

For the reasons given, this Court should issue a writ of *certiorari* to review the opinions of the Second Circuit.

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